IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MR. JUSTICE K.P.BALACHANDRAN

FRIDAY, THE 1ST JUNE 2007 / 11TH JYAISHTA 1929

MFA.No. 454 of 2002(E)
&
CROSS OBJECTION NO.137 OF 2005

OPMV.518/1996 of MOTOR ACCIDENT CLAIMS TRIBUNAL, TRIVANDRUM
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APPELLANT/2ND RESPONDENT:

THE DIVISIONAL MANAGER,
THE ORIENTAL INSURANCE COMPANY LIMITED,
THIRUVANANTHAPURAM, NOW REPRESENTED BY ITS ASSISTANT MANAGER, REGIONAL OFFICE,
METRO PALACE, KOCHI-18.

BY ADV. SRI.MATHEWS JACOB

RESPONDENTS/PETITIONER AND 1ST RESPONDENT:
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1. GRACY, D/O.CHINNAMMA, KISHORE BHAVAN,
K.P.S. JUNCTION, RESIDING AT SREEVILASOM,
RADHAKRISHNA LANE, VAZHAYUILA, PEROORKADA,
THIRUVANANTHAPURAM.

2. MURALI, S/O.SUBRAMANIAN,
THERUKULAM HOUSE, MURINGOOR,
VANDIKUNNU, KORATTY, CHALAKUDY.

BY ADV. SRI.T.A.SHAJI FPR R2
SRI.B.S.SWATHY KUMAR FOR R1
SRI.K.G.RENGANATH

THIS MISC. FIRST APPEAL HAVING BEEN FINALLY HEARD ON 01/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B.KOSHY & K.P.BALACHANDRAN, JJ.

M.F.A.NO.454 OF 2002 (E)

&

CROSS OBJECTION NO.137 OF 2005

Dated this the 1st day of June, 2007

J U D G M E N T

KOSHY,J.

This appeal is filed by the Insurance company. Sister of the 1st respondent died in a motor accident at the age of 43. While she was travelling in an autorickshaw owned and driven by the 2nd respondent a lorry hit the same and according to her accident occurred due to the negligence of the 2nd respondent alone. The autorickshaw was insured by the appellant Insurance company. She claimed compensation of Rs.2,63,500/- limiting the claim to Rs.2,00,000/-. According to the claimant her sister was an estate worker earning Rs.1,500/- per month. Tribunal calculated compensation taking Rs.1,000/- per month as loss of dependency and 15 as the multiplier. Total compensation calculated by the tribunal was Rs.2,10,000/-. But her claim was limited to Rs.2,00,000/- only.

Tribunal found that accident occurred due to the negligence of driver of autorikshaw she was travelling and the driver of the lorry. Tribunal apportioned negligence at 50% on both drivers. Since lorry driver was not made a party, tribunal awarded Rs.1,00,000/- to be paid to appellant Insurance company and the autorickshaw driver was found to be negligent only by 50%. Appellant Insurance company questioned the award on two grounds.

1. Multiplier taken by the tribunal is on the high side.

2. Driver of the autorickshaw had no valid licence at the time of accident. Hence amount ordered to be deposited should be allowed to be reimbursed by the insured.

2. Claimant filed cross appeal claiming that finding of negligence on the lorry driver was not correct. Apportionment of negligence by the tribunal is not correct. Deceased being a passenger in an autorickshaw cannot be attributed contributory

negligence. Compensation awarded was very low. It was also argued by the claimant that compensation awarded is inadequate and claimant who is unmarried and sick was fully depending on the deceased. It was contended by the counsel for the Insurance company that since appellant has not questioned the findings of apportionment of liability, cross appeal is not maintainable. Tribunal found that accident occurred equally due to the negligence of the driver of the lorry as well as the driver of the autorickshaw. Unfortunately claimant did not implead driver of the lorry. On going through the evidence, we see that there is no specific evidence to the effect that the driver of the autorickshaw alone was negligent. There is head on collusion in the public road. Scene Mahazar would show that both vehicles were driven negligently and if any of the drivers was diligent, accident could have been avoided. No eye witnesses were examined to prove that autorickshaw driver alone was negligent. We are of the view that no interference is required in the finding of the tribunal

apportioning negligence on both drivers equally. It is true that since the deceased was a passenger in an autorickshaw, there is no contributory negligence on his part, but the contributory negligence is only on the driver of the lorry. But driver of the lorry, owner and Insurance company which insured the lorry were not made parties. Since 50% negligence was attributed to the driver of the lorry, if they were parties, 50% of the compensation calculated could have been ordered to be paid by them. But since they were not made parties, Insurance company of the autorickshaw can be mulcted with only 50% liability as its driver was only negligent by 50% and we see no ground to accept the contention in cross appeal regarding apportionment of liability.

3. The deceased was aged 43 at the time of death. She left only one near relative, the claimant who was her sister. Deceased was unmarried and no other claimant is dependant. Claimants age was 47. Apex Court in ***H.S.Ahammed***

Hussain and another v. Irfan Ahammed and another (JT 2002 (5) SC 118) held that multiplier shall be fixed taking the life expectation of the deceased and of the claimant and whichever is short alone need be considered. Here claimant was 47 at the time of accident. Here taking second schedule for guidance, 13 is the multiplier and not 15 as fixed by the tribunal. If that be so compensation payable for loss of dependency will be Rs.1,000 x 12 x 13 = Rs.1,56,000/-. Tribunal has awarded Rs.25,000/- for loss of affection, loss of estate etc. These are not questioned in appeal. No amount is seen allotted for pain and sufferings. An amount of Rs.5,000/- ought to have been granted in that head as she died only in the hospital. No amount was seen awarded for funeral expenses, treatment in hospital, transportation to hospital, costs of ambulance for transporting dead body to the house etc. We award Rs.4,000/-. Thus total compensation payable will be Rs.1,90,000/-. Since appellant Insurance company who has to pay 50% of the amount calculated has to pay Rs.97,500/-.

4. Appellant again contended that in spite of the request driving licence of the autorickshaw driver was not produced. Contention of the Insurance company is that driver was having a driving licence earlier. But at the time of accident, it expired. Though it was later renewed, since at the time of accident he has no valid driving licence, appellant should be allowed to recover the compensation from the Insured. In this connection, we refer to the five bench decision of the Honourable Apex Court in ***National Insurance Co. Ltd. v. Swaran Singh and others (A.I.R. 2004 S.C. 1531)*** and also in ***Lal Chand v. Oriental Insurance company (2006 (7) SCC 378)*** wherein it is held as follows:

> "3. The breach of policy condition, eg., disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences

> available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time."
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> "6. Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."

Here Insurance company did not adduce any evidence to show that absence of licence was caused and as earlier lorry driver had licence before accident and after accident it was renewed. Merely for non-production of the driving licence it cannot be presumed that driver of the autorickshaw had no licence at the time of accident and therefore we are unable to grant the

Insurance company the right of recovery from the insured. We have already held that compensation payable by the appellant Insurance company is only Rs.95,000/-. Therefore Insurance company is directed to deposit Rs.95,000/- with interest as awarded by the Tribunal after deducting the amount if any already deposited. With that modification this appeal is partly allowed and the cross objection is disposed of accordingly.

J.B.KOSHY, JUDGE

K.P.BALACHANDRAN, JUDGE

prp

J.B.KOSHY & K.P.BALACHANDRAN, JJ.

M.F.A.NO.454 OF 2002 (E)
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J U D G M E N T

1st June, 2007